

**U.S. Department of Labor**

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Date: August 26, 1999

Case No.: **1998-LHC-0511**

OWCP No.: **5-102154**

In the Matter of:

**ORLANDO L. SERRELL,**  
Claimant,

v.

**NEWPORT NEWS SHIPBUILDING  
AND DRY DOCK COMPANY,**  
Self-Insured/Employer.

Representation:

Richard B. Donaldson, Jr.  
For the Claimant

Benjamin M. Mason, Esq.  
For the Employer

Before: RICHARD K. MALAMPHY  
Administrative Law Judge

**DECISION AND ORDER GRANTING TEMPORARY PARTIAL DISABILITY**

This proceeding arises from a claim filed under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et. seq.

A formal hearing was held in Newport News, Virginia, on March 22, 1999 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

## STIPULATIONS<sup>1</sup>

At the hearing, the parties stipulated as follows:

1. The parties are subject to the provisions of the Act.
2. That an employer/employee relationship existed between the parties at all relevant times.
3. Claimant sustained an injury arising out of and in the course of his employment.
4. Employer had timely notice of the injury.
5. Claimant filed a timely claim for benefits under the Act.
6. Employer filed a timely notice of controversion and a timely first report of accident.
7. Claimant's average weekly wage at the time of his injury was \$473.38, which yields a compensation rate of \$315.59.
8. Employer has paid temporary partial disability at a compensation rate of \$182.25 per week since October 21, 1998.
9. The Employer paid temporary total disability from August 12, 1997 to June 29, 1998 and from July 23, 1998 through October 20, 1998.
10. That Mr. Serrell, given his injuries and permanent restrictions, is not capable of returning to his pre-injury employment, and there is no alternative work at the employer.

## Issue

What is the Claimant's wage earning capacity?

## Contentions

The Claimant notes that the Employer has the burden to prove the availability of suitable alternate employment as appropriate jobs do not exist in the Shipyard.

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<sup>1</sup> The following abbreviations will be used as citations to the record:

TR - Transcript of hearing;  
CX - Claimant's Exhibits; and  
EX - Employer's Exhibits.

The Employer relies on a labor market survey prepared by Mr. Klein who never met the Claimant or had testing conducted. In January 1999, the Claimant contacted the Employers mentioned in the survey but did not find work due to the lack of an opening or the lack of requisite qualifications or abilities.

DOL referred the Claimant to Deborah Puckett for vocational rehabilitation. He underwent an interview, vocational testing, a labor market review of potential jobs, and job placement. The vocational testing included academic, aptitude, interest, intelligence, and personality tests. Mrs. Puckett, who is now privately employed, testified that the jobs identified by Mr. Klein are inappropriate or unavailable for the Claimant. In addition, these jobs do not begin with a 40-hour week in contrast to Mr. Klein's statements.

The Employer states that Mr. Klein has stated

that the Claimant would be able to work as a cashier, order taker, scheduler, unarmed security guard or solicitor. Mr. Klein then identified positions representative of others on the open labor market, that he confirmed with the prospective employers that these would be appropriate for the Claimant, and which have been available periodically from August 11, 1997.

The Employer argues that the Claimant has failed to diligently seek such employment. Although the Claimant inquired into the availability of each of the positions identified on the Labor Market Survey, he did not follow up with any of the three employers who were not hiring at the time he sought employment with them [TR. 128-29, 140], nor did the Claimant seek to find similar employment of which the identified jobs were only representative of. The Claimant was not told by any of these employers that his restrictions would hinder his performance of the job. [TR. 137-39].

In sum, the Claimant is a young, well-spoken, high school graduate with a demonstrated ability to learn new traits. Both Dr. Stiles and Dr. Thrasher have indicated a desire to have the Claimant return to gainful employment. NNS has established the existence of suitable alternate employment which the Claimant could perform, however the Claimant has failed to diligently seek such employment. Accordingly, the Claimant is not totally disabled and NNS was justified in reducing the Claimant's disability benefits.

### **Evaluation of the Evidence**

The Claimant has received extensive treatment from Dr. Stiles. [EX 3]. In July 1998, the physician assigned temporary restrictions based on back, shoulder and hand injuries. Mr. Serrell was limited to occasional crawling, kneeling, and pushing

and pulling. He was not to use vibratory tools or work above the shoulder level. [EX 6]. He could not climb vertical ladders.

In March 1999, Dr. Stiles assigned temporary restrictions that were valid until mid-May. The Claimant could climb stairs frequently but could not use vertical ladders. He could frequently stand or squat, but he could only occasionally push or pull but he was not to use vibratory tools or work above the shoulder level. [CX 3, CX 9].

In November 1997, the Claimant informed Dr. Sonberg, a neurologist, that he fell in 1994 and injured his head, neck, and upper back. He had undergone surgery on the left knee. In August 1997, he sustained injuries to his left wrist, left shoulder, head, and left flank.

Examination revealed good strength. Dr. Sonberg reported that the Claimant had post traumatic headaches. An MRI had shown mild herniation of the L4-5 disc. On examination in early 1998, the physician stated that

He is well developed and well nourished although his affect appears slightly off and he seems very mildly agitated and somewhat angry in the office. He remains alert and oriented. His attention and concentration is subtly unusual. He can follow conversation but he tends to be easily distracted or will be talking very assertively but will be staring to the left or to the right rather than directing his conversation toward me. There are no significant cranial nerve deficits identified. He has normal gait and station, normal strength. [CX 4]. The Claimant was also seen in December 1998. [DX 8].

Dr. Thrasher, a psychiatrist, reported that the Claimant was under his

care from December 1996 to February of 1998 with a diagnosis of major depression single episode without psychosis and post-traumatic stress disorder with paranoid personality disorder following injuries from a fall from work. He made some progress with supportive psychotherapy and intervention with Amitriptyline and Diazepam for sleep, mood and muscle spasms in his back. He had a view of himself as substantially disabled and viewed the shipyard as an extremely dangerous place and in general felt that he would not be able to succeed at returning to work.

On examination in February 1999, the physician noted that

He tends to obsess about what he perceives to be the way he was treated at work when he attempted to return to work.

Mental status examination reveals him to be relatively unchanged. He is somewhat vague and circumstantial in his speech. His affect was angry but frustrated with apprehension. There is no evidence of acute organic or psychotic process. He denies any suicidal or homicidal ideations. He judgement appears impaired by his illness and personality style. His memory appears grossly intact.

In March 1999, Dr. Thrasher stated that the Claimant was not precluded from working from a psychiatric perspective. However, work should focus on low physical risk. [CX 7].

Gary Klein, a certified rehabilitation counselor, completed a labor market survey in October 1998. Klein reviewed reports from the Shipyard, from Drs. Stiles, Solomon, Pile, Kyles, and Thrasher, as well as records from DOL.

Klein indicated that Serrell could work as a cashier, as an order taker, as a scheduler, as an unarmed security guard, and as a telephone solicitor. [EX 10].

Deborah Puckett reviewed Mr. Klein's survey and noted discrepancies in the jobs in the listing. Puckett stated that all of these jobs began with 20 to 35 hours of work per week. [CX 2].

The Claimant contacted the employers in Mr. Klein's survey. These were Ticket Master, Disabled American Veterans, Goodwill Industries, Racetrack (a gasoline station), and Clemons Security. [CX 1].

At the hearing, Gary Klein testified that he discussed the Claimant's suitability with the employers listed in the survey. The job descriptions were submitted to Dr. Stiles but the physician had not responded. These jobs were a sample of those available and the average wage was \$5.50 per hour for 40 hours a week. [TR. 52]. Klein did not ask Dr. Sonberg or Dr. Thrasher to approve the job descriptions. [TR. 93].

The Claimant testified that he briefly worked for the employer in the summer of 1998 and that Ms. Puckett was aiding him in placement. [TR. 123]. He was frequently treated by Drs. Stiles, Thrasher, and Hansen, and each physician prescribed medications. Some of these medications made him drowsy.

Serrell obtained the labor market survey in October and he had contacted the named employers. Tickmaster wanted someone with keyboard experience and DAV did not have an opening. Goodwill had only one part-time job as a truck driver and Racetrack felt that he could not perform the job. Clemons

Security did not have an opening. [TR. 130]. He acknowledged that he did not contact these firms again.

The Claimant stated that he had also sought assembly work with Canon and Siemens. The physicians had not placed him on restrictions due to the use of the prescribed medications. [TR. 148].

Deborah Puckett stated that she was now working for Career Options as a rehabilitation counselor. Puckett first worked with the Claimant in 1994. Serrell became her client again in February 1999. She noted that Klein had not performed vocational, intelligence, or personality testing. [TR 156].

Puckett stated that a job as a cashier at Goodwill was inappropriate as the Claimant had difficulty in dealing with people as she had noted in 1994. This job started with employment of 20 to 25 hours per week and required duties beyond his restrictions.

The job at DAV required good articulation on the telephone and requires the acceptance of denials in solicitation requests. Serrell would have problems in both areas. In addition, workers began at 30 hours per week.

Work at Ticketmaster requires almost constant sitting and infrequent breaks. The job ranged from 20 to 35 hours per week. Puckett stated that she wished to place clients in appropriate long terms jobs. She felt that Klein had listed inappropriate jobs.

Ms. Puckett stated that testing revealed Serrell's math level at the fifth grade, arithmetic at the same level, spelling at ninth grade, and reading at the tenth grade level. This was typical of a high school graduate. [TR. 193].

### **Discussion**

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, the employee has the initial burden of proving total disability. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury.

If the claimant makes this prima facie showing, the burden shifts to employer to show suitable alternative employment. Clophus v. Amoco Prod, Co., 21 BRBS 261 (1988); Nguyen v. Ebttide Fabricator, 19 BRBS 142 (1986). (See partial disability, infra.) A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989) (involving injury to a scheduled member); MacDonald

v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986), aff'd, No. 86-3444 (11th Cir. 1987) (unpublished).

The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community.

Mr. Klein produced a labor market study that listed several job titles with a sample of openings that had been or were available. The Claimant has stated that he asked each employer and there were no openings among the listed jobs.

Ms. Puckett questions the Claimant's ability to work in a face to face situation such as in a job as a clerk. However, Dr. Thrasher stated that the Claimant should avoid jobs only where there was a sense of danger.

The undersigned does feel that Ticketmaster may be inappropriate as the Claimant would have to learn basic computer skills and he would be restricted in his ability to move around and to take breaks.

While Mr. Serrell did not find those specific jobs available, Klein indicated that there were other openings in job categories such as retail clerk and security guard. It is noted that Ms. Puckett stated that such jobs, if available, offered 20 to 35 hours of employment at the beginning.

I find that the Employer has demonstrated the availability of suitable alternate employment. However, such work would be limited to 25 hours per week at the minimum hourly wage of \$4.75 at the time of the Claimant's injury in August 1997.

Neither Klein nor Puckett testified as to the wage paid in mid-1997 for the jobs identified in the survey. Therefore, I will apply the minimum wage rate that was paid at that time.

### **ORDER**

1. The Employer is to pay temporary partial disability to the Claimant from October 21, 1998 and continuing at a compensation rate of \$236.43 per week ((473.38-(\$4.75x25)x2/3=\$236.43)).

2. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).
3. All computations are subject to verification by the District Director.
4. Employer shall receive a credit for all compensation that has been paid.
5. Pursuant to Section 7 of the Act, Employer shall provide treatment for Claimant's work-related impairments.
6. Claimant's attorney within 20 days of receipt of the order shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

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RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/ccb  
Newport News, Virginia